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No. 85-1759

In The
Supreme Court of the United States
October Term, 1985

THE STATE OF TEXAS,

Petitioner,

v.

RONALD GERALD ADLEY,

Respondent.

BRIEF IN OPPOSITION

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

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85-1759

QUESTIONS PRESENTED

The questions presented, as formulated by the Petitioner, are:

I.

Does the phrase "receive a bet" in the Texas gambling promotion statute, when measured by common understanding and practice, provide adequate warning and fair notice to persons of ordinary intelligence as to what conduct is proscribed?

II.

Is the phrase "receive a bet" in the Texas gambling promotion statute, when measured by common understanding and practice, sufficiently distinct from the phrase "make a bet" in the lesser offense of gambling so as to prevent arbitrary arrests and convictions?

The questions presented, as formulated by the Respondent, are:

1.

Whether the holding of the Texas Court of Criminal Appeals in this case is founded upon adequate state grounds, such that no federal issue is presented?

2.

Whether "receiving a bet," as used in § 47.03(a)(2) of the Texas Penal Code, is vague under the Due Process Clause of the Fourteenth Amendment.

LIST OF PARTIES

Ronald Gerald Adley, the Respondent

The State of Texas, the Petitioner

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RONALD GERALD ADLEY,

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BRIEF IN OPPOSITION

On Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas

RONALD GERALD ADLEY, Respondent, files this Brief in Opposition to the Petition for Writ of Certiorari (hereafter "Petition") filed herein by the State of Texas, Petitioner.

OPINIONS BELOW

The Petitioner's recitations respecting the opinions below are correct. See Rule 34.2 of the Rules of this Court.

JURISDICTION

The Petitioner's factual jurisdictional recitations are correct, as is the recitation that 28 U.S.C. § 1257(3) confers jurisdiction upon this Court to hear cases involving the Constitution of the United States. *Petition* 2.

Because the Respondent claims that this case was decided by the lower court upon a state ground, independent of the Constitution of the United States, he disagrees that this Court properly has jurisdiction to hear the case under 28 U.S.C. § 1257(3).

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions involved are included in the *Petition*. See Rule 34.2, *supra*.

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STATEMENT OF THE CASE

Ronald Gerald Adley was convicted of receiving a bet, a violation of § 47.03(a)(2).[1] By a pretrial motion to quash the indictment, he challenged the validity of the indictment on eight specified grounds, six of which were predi-

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[1] Section 47.03(a)(2) proscribes receiving, recording, and forwarding bets. Only the "receiving" portion of the statute is implicated in this case.

cated upon the unconstitutionality of § 47.03(a)(2).[2] That motion was overruled. The issues raised in that motion formed the crux of his appeal in the Texas courts.

The Texas Court of Appeals recognized the Petitioner's attack upon the indictment "on the grounds that it was unconstitutionally vague, and overruled the contention without discussion on the authority of *Powell v. State*, 624 S.W.2d 818 (Tex.App.—Beaumont 1981, no pet.), and *State v. Koo*, 647 P.2d 889 (Okla.Cr.App.1982), *cert.den.*, 459 U.S. 1036 (1982). That court did not intimate whether it perceived the Petitioner's attack to be grounded upon state or federal constitutional grounds.

On discretionary review, the Texas Court of Criminal Appeals specifically considered that part of the Petitioner's attack upon the constitutionality of § 47.03(a)(2) centering upon a comparison of §§ 47.02(a)(1) and 47.03(a)(2), and his claim that because the conduct proscribed by both sections are functionally the same such that an individual cannot distinguish whether his conduct constitutes a violation of one section or the other, § 47.03(a)(2) is vague and void. *Adley v. State, Petition,* App. 2. The Court agreed with the Petitioner, and declared "that § 47.03(a)(2), *insofar as it prohibits receiving a bet,* is unconstitutionally vague . . ." *Id.* at 8 (emphasis added).

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[2] Only one of these grounds invoked the Fourteenth Amendment.

REASONS FOR NOT GRANTING THE WRIT

1.

The Holding of the Court of Criminal Appeals in This Case is Based on State Grounds, Independent of Federal Constitutional Law, and Thus Presents No Federal Question.

The Petitioner posits its claim for relief upon the existence of a federal question involving the interpretation of "gambling promotion" laws and a purported conflict between several jurisdictions respecting the interpretation of those laws. *Petition* 4-5, 9-10. We submit that there is no federal question involved in this case, and that the "conflicts" upon which the Petitioner relies are spurious.

No Federal Question Is Involved In This Case

At the outset, it is important to remember that whenever the construction of a state statute is implicated, "this Court ordinarily accepts the construction given a state statute in the local courts and also presumes that the statute will be construed in such a way as to avoid the constitutional question presented." *Baggett v. Bullitt*, 377 U.S. 369, 375 (1964).

The issue before the Court of Criminal Appeals was whether the receiving-a-bet portion of § 47.03(a)(2) could coexist with § 47.02(a)(1) under the Texas rules of statu-

tory construction;[3] it was that issue which the Court of Criminal Appeals decided. That court identified the Respondent's contention thusly:

> Specifically, [the Respondent] argues that the trial court reversibly erred in failing to grant his motion to quash wherein he alleged that the statutory language of "receiving a bet" was vague and that the allegation that he received a bet was subject to varied interpretation, thereby failing to give him the requisite notice."

Petition, App. 1. The court went on to describe the issue in the following terms:

> The claim presented here centers upon a compari- of . . . §§ 47.02(a)(1) and 47.03(a)(2). [Adley] claims that the conduct of "receiving a bet," prohibited in § 47.03(a)(2) as a felony, and the conduct of "making a bet" prohibited in § 47.02(a)(1) as a misdemeanor, are functionally the same conduct. He contends that an individual cannot determine whether his conduct constitutes a felony or a misdemeanor, thereby rendering the statute void.

Id. at 2.

The Court of Criminal Appeals concluded that because the act of receiving a bet proscribed by § 47.03(a)(2) is indistinguishable from the conduct denounced in § 47.02(a)(1), § 47.03(a)(2) is unconstitutionally vague. *Id.* at 8. In reaching this decision, that court was concerned only with whether the prohibition in § 47.03(a)(2) against receiving a bet could be reconciled with the offense of making a bet,

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[3] The Petitioner's assertion that Mr. Adley "squarely implicated the United States Constitution in his motion to quash", *Petition* 6, n. 2, is disingenuous. Although the Fourteenth Amendment was cited in one paragraph of the motion, the majority of the eight issues raised and the overall thrust of the motion clearly challenged the statute on grounds that it was irreconcilable with § 47.02(a)(1) under state grounds, specifically, pursuant to the accepted Texas rules of statutory construction.

as denounced in § 47.02(a)(1)—not with whether the offense of receiving a bet, as contained in § 47.03(a)(2), was vague per se. Finding that the two statutes were irreconcilable, the court was obliged to declare one of them unconstitutional.

The basis for the court's decision to declare the receiving-a-bet portion of § 47.03(a)(2) unconstitutional is Texas law, not federal constitutional law, although the latter is implicated to the extent applicable Texas law utilizes principles of federal constitutional law. The Texas penal code declares that crimes shall be defined and construed "to give fair warning of what is prohibited and of the consequences of violation,"[4] and to "guide and limit the exercise of official discretion in law enforcement to prevent arbitrary or oppressive treatment of persons accused . . . of offenses."[5] These declarations codify the expressions of this Court in *Papachristou v. City of Jacksonville,* 405 U.S. 156 (1972), and cases therein cited. Thus, although the Court of Criminal Appeals quoted from *Papachristou* when reciting these principles, this Court should presume, under *Baggett v. Bullitt, supra,* that the Court of Criminal Appeals was construing § 47.03(a)(2) consistent with Texas law, and not applying federal constitutional law.[6]

That the Court of Criminal Appeals declared § 47.03 (a)(2) unconstitutional instead of § 47.02(a)(1), provides

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4 TEX.PENAL CODE ANN. § 1.02(2) (Vernon 1974).

5 *Id.* § 1.02(5).

6 In his brief filed with the Court of Criminal Appeals, Adley specifically grounded his argument that § 47.03(a)(2) was unconstitutionally vague upon the quoted provisions of the Texas penal code, coupled with Texas decisions construing those provisions. *Appellant's Brief* [on petition for discretionary review], pp. 8-13.

further evidence that *Adley* is grounded upon Texas law. Confronted with two statutes dealing with the same subject matter, but dissimilar in their respective treatment of that subject, the Court of Criminal Appeals followed the customary Texas practice of attempting to harmonize the statutes under the *in pari materia* doctrine. See *Alejos v. State,* 555 S.W.2d 444 (Tex.Cr.App.1977). Unable to do so because of the disparate punishments provided for each statute and due to the existence of a defense applicable only to § 47.02(a)(1) conduct, that court was obliged to then apply the Texas rule of statutory construction that a general statutory provision must yield to a specific provision dealing with the same subject matter where the two are in conflict. *Ex parte Holbrook,* 606 S.W.2d 925 (Tex.Cr.App. 1980); *Valdez v. State,* 553 S.W.2d 110 (Tex.Cr.App.1977). Since federal constitutional law, and more particularly due process considerations, does not control which of two inconsistent state statutes must be vitiated, the only basis upon which the Court of Criminal Appeals could have declared the "receiving" portion of § 47.03(a)(2) unconstitutional was pursuant to Texas law.

The simple fact, which the Petitioner has ignored, is that the Court of Criminal Appeals did not test the "receiving" portion of § 47.03(a)(2) against the federal due process yardstick, but instead resolved the conflict between the "receiving" portion of § 47.03(a)(2) and § 47.02(a)(1) solely on the basis of applicable Texas rules of statutory construction. Thus, there is an adequate basis for the decision of the Court of Criminal Appeals founded in Texas law, independent of federal constitutional issues, obviating the need for this Court to review this case.

2.

The Alleged Conflicts Between the Decision Below and Decisions by Other Courts Regarding Gambling Statutes is Insufficient to Warrant Review by This Court.

The Petitioner asserts that the decision in this case conflicts with decisions construing "almost identical" statutes, and that this Court should review this case to establish uniformity among the states with respect to gambling laws. *Petition* 8-9, 12-14. This argument fails for two reasons. First, the 'other decisions' are not in conflict with the decision of the Texas Court of Criminal Appeals. And, second, this Court is not charged with responsibility of assuring uniformity among the states with respect to the interpretation of state statutes where federal constitutional principles are not implicated.

The Oklahoma and Wisconsin gambling statutes involved in *United States v. Hines,* 696 F.2d 722 (10th Cir. 1982), *State v. Koo,* 647 P.2d 889 (Okla.Cr.App.1982), and *State v. Vlahos,* 50 Wis.2d 609, 184 N.W.2d 817 (1971), were attacked specifically on the ground that they were unconstitutionally vague *per se. United States v. Hines, supra,* 696 F.2d at 726-727; *State v. Koo, supra,* 647 P.2d at 892; *State v. Vlahos, supra,* 184 N.W.2d at 821. In none of those cases did it appear from the courts' opinions that the statutes in question were being attacked because they conflicted with other statutes similar to Texas' § 47.02 (a)(1). Because the courts in the cited cases were not called upon to decide the issue involved in this case, the holdings in those cases cannot be said to be in conflict with the opinion of the Texas Court of Criminal Appeals in this case.

To the extent the *Vlahos* opinion notes a distinction between "making a bet" and "receiving a bet," 184 N.W.2d at 820-821, upon which the Petitioner heavily relies, several observations are appropriate. First, the *Vlahos* court did not consider the effect of the defense provided in § 47.02(b) not applying to § 47.03(a). This dissimilar legislative treatment of gambling was a significant factor to the Texas Court of Criminal Appeals in the decision rendered in this case. *Adley v. State*, — S.W.2d — (*Petition*, App. 6). Second, that court quite obviously did not evaluate the claim presented in this case that "receiving a bet" was vague under both the Texas penal code and Texas' rules of statutory construction. The Petitioner's claim that *Vlahos* dealt with the "ultimate contention that 'making' a bet and 'receiving' a bet were the same thing," *Petition* 10, is a superficial attempt to draw a critical parallel between the two cases that does not exist.

In the Petitioner's view, "the Texas Court of Criminal Appeals' opinion is wrong," while the Supreme Court of Wisconsin possesses significantly greater wisdom in divining the meaning of gambling statutes. It is not surprising that we are not informed of why this comparative evaluation should be accepted since *Vlahos* is admittedly predicated upon the dubious assertion that "gambling . . . is unquestionably criminal conduct." *State v. Vlahos*, *supra*, 184 N.W.2d at 821. The legislatures of the many states that have enacted lotteries and other forms of commercial gambling, as well as Congress, which taxes gambling, certainly do not share the Wisconsin Supreme Court's draconian views about gambling being unquestionable criminal conduct. Given this attitude about gambling, it is altogether understandable that the Wisconsin Supreme

Court would, as it did, uphold a gambling statute because it sought to punish a person based only his status, i.e., being a bookmaker, *Vlahos, supra,* 184 N.W.2d at 821, despite the contrary expressions of this Court. *Papachristou v. Jacksonville, supra,* 405 U.S. at 162-164.

In any event, the Petitioner's suggestion, advanced without benefit of any authority, that review of this case is appropriate in order that this Court might establish a uniform policy with respect to state gambling statutes is meritless. The wisdom of a state statute rationally related to a legitimate governmental interest, or the wisdom of a state court's construction of such a statute, is not a matter over which this Court has the power to act, except when the statute infringes upon rights guaranteed by the federal constitution. *Dandridge v. Williams,* 397 U.S. 471 (1970). The mere disagreement between the highest courts of Texas and Wisconsin regarding the propriety of their states' gambling laws does, without more, provide a basis for this Court's intervention in those state's activities.

3.

The Social Ills of Gambling Perceived by the Petitioner Do Not Merit Review of This Case.

Relying on *Sports Illustrated,* the Petitioner seeks review of this case because the decision by the Texas Court of Criminal Appeals leaves "Texas helpless against the onslaught of professional gambling." *Petition* 14.

The Petitioner's rhetorical flourish proceeds from the fallacious assumption recited in *Vlahos* that gambling is inherently criminal and that it must be punished. We need look no further than the many states in which commercial

gambling is legislatively countenanced — indeed, where commercial gambling is a function of state government in the form of state lotteries, for conclusive proof to rebut the Petitioner's assertions.

To the extent the Petitioner seeks review of this case to protect against the social ills it perceives accompany gambling, we believe it proper and important to suggest that the Court consider the fundamental question of whether Congress has pre-empted the states from outlawing gambling by virtue of the taxes it has imposed on that activity. For almost as long as this country has existed, it has been well-settled that the states cannot frustrate the efforts of Congress in carrying out its constitutional duties. *McCulloch v. Maryland,* 4 Wheat. 316 (1819). Once Congress acts within its constitutional ambit, no state may thereafter frustrate or impede either the spirit or the letter of that law. *International Shoe Company v. Pinkus,* 278 U.S. 261 (1929).

Long before the enactment of the Texas laws criminalizing certain forms of gambling, Congress exercised its constitutional authority to impose taxes, U.S.Const. art. 1, upon gambling activities. 26 U.S.C. § 4401 et seq. Those laws are of unquestioned validity. *United States v. Kahriger,* 345 U.S. 22, 31 (1953). The obvious purpose of these statutes was to increase the nation's revenues. *United States v. D.I. Operating Company,* 362 F.2d 305, 308 (9th Cir. 1966). By taxing gambling activities, Congress preempted the states from acting in the area of gambling in a manner contrary to the intent of Congress. Thus, although it may be an appropriate exercise of state police power to outlaw gambling, the exercise of that power is im-

permissible to the extent it eliminates the basis for the federal taxes on gambling or frustrates the congressional objective to secure those taxes. *Castle v. Hayes Freight Lines,* 348 U.S. 61 (1954).

If the Petitioner's figures are accurate, the $10 million wagered each football weekend in the Dallas-Fort Worth area generate $200,000 in tax revenues to the United States. The potential loss of this revenue is a "practical consideration" which must be considered if review of this case is granted.

4.

The "Receiving-a-Bet" Portion of § 47.03(a)(2) is Void for Vagueness Under the Fourteenth Amendment.

Succinctly stated, the holding of the Texas Court of Criminal Appeals that since "making" and "receiving" bets are functionally the same conduct, and are punishable by both felony and misdemeanor penalties, it may not be left to the unfettered discretion of the police, prosecutors and judiciary to determine who shall be punished as a felon or a misdemeanant for doing the same act. The decision is further grounded on the specific language of § 47.02(b) that it is a defense to the misdemeanor conduct, but not to the felony conduct, that: (1) the actor engaged in gambling in a private place; (2) no person received any economic benefit other than personal winnings; and (3) except for the advantage of skill or luck, the risk of losing and the chance of winning were the same for both participants.

Under the general principles of constitutional law enunciated by this § 47.03(a)(2); to the extent it prohibits

receiving a bet, is unconstitutionally vague. Viewed in conjunction with § 47.02(a)(1), it offends several values implicit in the vagueness test: First, it may trap the innocent by not providing fair warning; and, second, it impermissibly delegates basic policy matter to policemen, prosecutors, judges, and juries for resolution on an ad hoc basis, with attendant dangers of arbitrary and discriminatory application. See *Grayned v. City of Rockford,* 408 U.S. 104 (1972). Accepting the fact that the conduct penalized by both statutes is the same, police and prosecutors may deprive an individual of valuable defenses by simply indulging in the fiction that the person "received" the bet rather than "made" the bet. It is submitted that a reasonable person reading § 47.02 could conclude that no criminal penalty whatsoever would attach to his conduct if it met the requirements of the affirmative defense provided in subsection b. The Respondent, however, was deprived of the opportunity to present such defense by the choice of the charging authorities. In light of such statutory imprecision, when the language of both statutes are read together, they do not provide adequate warning to anyone, they do not contain sufficient guidelines for law enforcement officials to properly apply them, nor do they limit courts and juries in applying the laws or in punishing violations of those laws.

This Court has frequently applied the doctrine of vagueness to incorporate the notion of fair notice or warning, requiring legislatures to set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent arbitrary and discriminatory enforcement. See *Smith v. Goguen,* 415 U.S. 566 (1974). The Petitioner argues that since the statutes herein do not implicate

First Amendment considerations, the void for vagueness doctrine should be relaxed. *Petition* 7-9. While the vagueness doctrine should be applied more strictly in a First Amendment case than in most other contexts, this case involves a criminal statute which should be narrowly construed, thus calling for a strict application of the doctrine. *United States v. Laub*, 385 U.S. 475 (1967). Further, crimes are not to be created by inferences drawn from the statutes by authorities with the responsibility of enforcement. Neither may they be construed nunc pro tunc. *United States v. Laub, supra.* Under the foregoing gambling statutes, a person in Texas could be reasonably well assured that his conduct was either a misdemeaner or would have no criminal liability whatsoever based on a good faith reliance on the plain language of § 47.02(b), but he nevertheless could be prosecuted as a felon for what he believed was either innocent or misdemeanor conduct at the complete discretion of the charging official. The commands of § 47.03(a)(2) are not only vague and undefined, they inexplicably contradictory and actively mislead the reader. See *United States v. Laub, supra.* On the other hand, § 47.02 (a)(1) is a narrow and precise statement of what is prohibited and what is permitted. Such a statute, by virtue of its precision, operates to lull a potential defendant into a false sense of security, giving him no reason to suspect that conduct he reasonably believes meets the requirements of the law will be punished under another, broader law. To the extent this occurs because of the judicial construction of the law, it constitutes unforseeable judicial enlargement of a criminal statute and is prohibited when applied retroactively. *Bouie v. City of Columbia*, 378 U.S. 347 (1964).

We submit that the conclusion reached by the Court of Criminal Appeals, although it was predicated upon state

grounds, was correct under federal constitutional standards as set out in *Papachristou* and *Thornhill v. Alabama*, 310 U.S. 88 (1940). Section 47.03(a)(2), construed with § 47.02 (a)(1), fails to give fair notice of the conduct forbidden and encourages arbitrary and erratic arrests and convictions. Accordingly, it is unconstitutionally vague under the federal constitution.

CONCLUSION

For the reasons stated herein, the Petition filed in this case should be denied.

Respectfully submitted,

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